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No. 07-526

In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTON, RHODE ISLAND,
Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER STATE OF RHODE ISLAND

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QUESTIONS PRESENTED

1. In the 1934 Indian Reorganization Act, Congress authorized the Secretary of the Interior to take land into trust for "all persons of Indian descent who are members of any recognized tribe *now* under federal jurisdiction." 25 U.S.C. §479 (emphasis added). The question presented is whether the 1934 Act empowers the Secretary to take land into trust for the Narragansett Indian Tribe, which was not recognized and not under federal jurisdiction until 1983.

2. In 1978, Congress codified a settlement agreement between Rhode Island and the Narragansett Indian Tribe. The Rhode Island Indian Land Claims Settlement Act provided the Tribe with settlement lands and prohibited any further Indian lands in Rhode Island by extinguishing all aboriginal title and "all claims …based upon any interest in or right involving land." 25 U.S.C. §§1702(f), 1705, 1712. The question presented is whether the Rhode Island Indian Claims Settlement Act prohibits the Secretary of the Interior from taking land in Rhode Island into trust on behalf of an Indian tribe.

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OPINIONS BELOW

The en banc First Circuit opinion (Pet. App. 1-81) is reported at 479 F.3d 15. The district court opinion (Pet. App. 84-136) is reported at 290 F.Supp.2d 167.

JURISDICTION

The en banc court of appeals entered its judgment on July 20, 2007. The petition for a writ of certiorari was filed on October 18, 2007, and granted on February 25, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Reorganization Act of 1934 (the "IRA" or "1934 Act"), 25 U.S.C. §§461, 465, 468, 472, 479, and the Rhode Island Indian Claims Settlement Act (the "Settlement Act"), 25 U.S.C. §§1705, 1707, 1712, are reproduced in the statutory appendix to this brief. App., *infra*, 1a - 9a.

STATEMENT OF THE CASE

At issue in this case is the continuing vitality of two limits Congress imposed on the Secretary of the Interior's extraordinary authority to take land into trust for Indians. When the Secretary takes land into trust, he strips away the host state's sovereignty and jurisdiction and places them in the hands of a competing sovereign. Because the Secretary's power strikes at the core of our Federalism, Congress imposed limits on it. One limit is the definition of "Indian" in the Indian Reorganization Act of 1934,

which restricts the class of persons for whom the Secretary can take land into trust. When tribal membership is the basis of a trust application, Congress carefully specified that only tribes that were subject to the devastating consequences of the federal allotment policy qualify. And in the Rhode Island Indian Claims Settlement Act, Congress – at the Narragansett Tribe's behest – foreclosed the prospect of any further claim, interest in, or right to any sovereign Indian occupied lands in Rhode Island. The First Circuit's ruling has vitiated both limitations on the Secretary's power to transfer sovereignty and jurisdiction from the State to Indian tribes.

I. The Rhode Island Claims Settlement Act

A. The Early History of the Colony, State, and Tribe

The Narragansett Indians (the "Tribe"), along with the Niantic and Wampanoag Indians, were the earliest inhabitants of the area known today as the State of Rhode Island and Providence Plantations. William G. McLoughlin, *Rhode Island: A History* 2-9 (W.W. Norton & Co. 1978) ("McLoughlin").[1] One of the early Rhode Island colonists was Roger Williams. Williams, unlike other Puritan colonists, sought to maintain peaceful relations with the Native Americans. *Id*. at 2-9. He settled in the area of Providence with the permission of the Chief Sachems of the Narragansett

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[1] *See also* Final Determination for Federal Acknowledgement of Narragansett Tribe of Rhode Island, 48 Fed. Reg. 6,177 (Feb. 20, 1983) ("Federal Acknowledgement").

Indians; other settlements developed in Rhode Island in part because of the friendly relationship Williams had with the neighboring tribes. *Id.* at 4, 9.

In 1644, Roger Williams secured a charter from the civil authorities in England to fend off the other colonies' aggressive desire for land and to establish the political sovereignty of the Rhode Island settlements. *Id*. at 27-28. The pressures for land in Rhode Island continued, and in 1663 King Charles II issued a royal charter, which (among other things) authorized the Colony of Rhode Island to "direct, rule, order, and dispose of, all other matters" relating to "the making of purchases of the native Indians."[2]

The peaceful relations in Rhode Island came to an end with King Philip's War of 1675-1676. McLoughlin at 40. That conflict arose from the pursuit of land by the United Colonies of New England (the Massachusetts Bay, Plymouth, Connecticut, and New Haven colonies), and rivalries between Indian tribes of southern New England. *Id.* at 40-45. The war, principally between the United Colonies and the Wampanoags, "was not of Rhode Island's making, nor did the people of Rhode Island wage it." *Id* at 41-42. Rhode Island and the Narragansett Indian Tribe sought unsuccessfully to stay neutral. *Id*. at 42. By war's end, the settlements on the mainland of Rhode Island were destroyed and the Narragansetts were decimated. *Id*. at 44-45. Subsequently, some of the

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[2] Royal Charter to Rhode Island Colony, King Charles II dated July 8, 1663. *See Johnson v. McIntosh*, 21 U.S. 543, 601-04 (1823) (recounting circumstances surrounding 1663 Charter).

Tribe combined with the Niantics, who remained neutral, and became the Narragansett Indian Tribe. *Id*. at 44-45.[3] The Tribe remained essentially self-governing and became generally subject to the protection and supervision of the colony. *Id*.

In 1709 the Sachem of the Narragansetts, Ninigret, conveyed a deed to Rhode Island, which established a guardianship between the Colony and the Tribe.[4] In the deed, Ninigret exempted an eight-square-mile area for the Tribe in the area of present-day Charlestown.[5] The colonial reservation diminished over time by the

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[3] *See also* Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island dated July 29, 1982 at 2 (available at http://64.62.196.98/adc/Nar/V001/D007.TIF) (last visited June 3, 2008) ("Recommendation for Federal Acknowledgement").

[4] State of Rhode Island and Providence Plantations, "Narragansett Tribe of Indians, a Report of the Committee of Investigation, An Historical Sketch, and Evidence Taken Made to The House of Representatives 1880-1883" at 18, E.L. Freeman Providence ("Report of Comm."); Deed of Ninigret to the Colony, March 28, 1709, *reprinted in* Report of Comm. 1881, Appendix B at 26-28; Recommendation for Federal Acknowledgement at 2-4, 9. The 1709 Deed between the Colony and the Tribe arose due to the unsettled boundary dispute between the Connecticut Colony and Rhode Island and the land claims by the Atherton Company from the 1660's against the Narragansett's land. *See*, Deed of Ninigret at 26; *see also* McLoughlin at 40.

[5] Report of Comm. 1881, Appendix B at 26-28.

sale of land and encroachment.[6] The wardship ended and the Tribe disestablished in 1883 when the Tribe sold the remaining colonial reservation, consisting of approximately 927 acres of vacant tribal land, to the State for $5,000.[7]

B. The Tribe's Land Claims Lawsuit and the Settlement

In 1975 the Tribe brought suit against the State, and various landowners, claiming that 3,200 acres of aboriginal land in Charlestown were improperly alienated without congressional approval in violation of the Trade and Intercourse Acts, 25 U.S.C. §177. On February 28, 1978, after intense negotiations, the parties compromised and entered into the "Joint Memorandum of Understanding Concerning the Settlement of The Rhode Island Indian Land Claims" (the JMOU). J.A. 22a-35a. The essence of the agreement was that the Tribe would obtain 1,800 acres of the land it sought, on which it could establish its own hunting and fishing regulations (subject to minimum standards); in exchange, it agreed to relinquish all other Indian land claims.

More specifically, under the JMOU, the State agreed to provide approximately 900 acres of land to the Tribe, and the parties agreed to seek $3.5 million from the federal government for the Tribe to acquire an additional 900 acres. 25 U.S.C. §§1702(d), (e).

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[6] Report of Comm. 1880 at 16-20.

[7] Recommendation for Federal Acknowledgement at 4.

These 1800 acres are the "Settlement Lands." 25 U.S.C. §1702(f). The JMOU provided for the creation of a state corporation, controlled by the Tribe, to hold the Settlement Lands in trust for the Tribe's benefit. On these lands, except for local property taxation and hunting and fishing rights, "all laws of the State of Rhode Island shall be in full force and effect." JMOU ¶ 9, 11, 13; J.A. 24a-25a. Meanwhile, the Tribe agreed that:

> Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island, and effectively clears the titles of landowners in Rhode Island of any such claims.

JMOU ¶ 6; J.A. 23a-24a. Exhibit C to the JMOU set forth proposed federal legislation, which specified that the Tribe would relinquish all claims to aboriginal title and any other uniquely sovereign claims, including subsequent claims for use and occupancy.

C. The Settlement Act

Pursuant to the requirements of the Trade and Intercourse Acts, the parties approached Congress in July 1978 to obtain its approval for the "extinguishment of Indian land claims … limited to those claims raised by Indians *qua* Indians." H.R. Rep. 95-1453 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1948, 1955. Congress emphasized the importance of the bill "in that it follows the precedent set in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq*., by providing the Indians with an

opportunity to acquire a viable land base in the process of resolving their claims to aboriginal lands." H.R. Rep. 95-1453 at 1951.

In September 1978 Congress codified the JMOU in the Settlement Act, 25 U.S.C. §1701 *et seq*. Congress appropriated money for the Tribe to purchase 900 acres of private land, while the State contributed the other 900 acres to create the Settlement Lands. 25 U.S.C. §§1702(d), (e), (f), 1703. In return, the Act extinguished the Tribe's claim of aboriginal title in the United States, and specifically in Charlestown, Rhode Island. 25 U.S.C. §1705(a)(2). Moreover, Congress decreed that:

> all claims … by … the Narragansett Tribe of Indians or any predecessor or successor in interest ... arising subsequent to the transfer [of land] and based upon any interest in or right involving such land ... (including but not limited to claims for trespass damages or claims for use or occupancy) shall be regarded as extinguished as of the date of the transfer.

25 U.S.C. §1705(a)(3). Congress also determined that, after the "discharge of the Secretary's duties," "the United States shall have no further duties or liabilities under this subchapter" with respect to the Tribe or the Settlement Lands. 25 U.S.C. §1707(c).

Congress codified the requirement that a state corporation would "acquire, perpetually manage, and hold the settlement lands." 25 U.S.C. §1706(a)(1). And, consistent with the JMOU, Congress ordained that, except as agreed to and provided in the

Settlement Act, "the [s]ettlement [l]ands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. §1708. The Tribe did not receive federal recognition or have the Settlement Lands taken into trust in the Settlement Act. In addition, Congress comprehensively eliminated "all claims" by any other "Indian, Indian nation, or tribe of Indians . . . based upon any interest in or rights involving such land," including claims for use and occupancy. 25 U.S.C. §1712(a)(3).

II. Federal Acknowledgement of the Narragansett Indian Tribe

Little over a year after Congress enacted the Settlement Act, the Tribe applied to the Department of the Interior ("Department") to be acknowledged as an Indian tribe.[8] The Department officially acted on the application in 1982 and, on February 10, 1983, the Tribe received federal acknowledgement.[9]

During the process of acknowledging the Tribe, the Department found that "[t]here has been relatively little Federal contact" and "no [prior] Federal responsibility for or jurisdiction over the group."[10] In fact, the Office of Indian Affairs confirmed in correspondence with members of the Tribe in the 1920's that Congress had never provided any authority to "exercise the jurisdiction which is necessary to

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[8] Recommendation for Federal Acknowledgment at 15.

[9] Federal Acknowledgement, 48 Fed. Reg. 6, 177 (Feb. 10, 1983).

[10] Recommendation for Federal Acknowledgment at 8.

manage their affairs" because they had been "under the jurisdiction of the different states of New England." J.A. 18a-19a. The Office repeated this view in a March 18, 1937 letter to Rhode Island Congressman John M. O'Connell, which states that the Tribe has "never been under the jurisdiction of the Federal Government." J.A. 20a.

III. The Indian Reorganization Act

On June 18, 1934, Congress enacted the IRA, ch. 578, 48 Stat. 984, 25 U.S.C. §461 *et seq*., and once again dramatically reoriented federal Indian policy. For much of the nineteenth century, federal policy was to segregate lands (reservations) for the "exclusive use and control of Indian tribes." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 253 (1992). By contrast, the allotment policy of the late nineteenth century – under which reservation lands were allotted to tribe members individually – sought to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians" into society at large. *Id*. at 253-54 (discussing allotment policy). Through the IRA, Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-[allotment] era." *Id*. at 255. The IRA did this by, among other things, prohibiting further allotment of reservation lands and authorizing the Secretary of the Interior to restore surplus reservation lands to tribal ownership. 25 U.S.C. §§461, 463.

Of particular relevance here, Section 5 of the IRA, 25 U.S.C. §465, authorized the Secretary, "in his

discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing lands for Indians." Section 19 of the IRA, 25 U.S.C. §479, in turn, defines who is an "Indian" for purposes of the statute as follows:

> all persons of Indian descent [1] who are members of any recognized Indian tribe *now* under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation, and [3] . . . all other persons of one-half or more Indian blood.

(emphasis added). The Narragansetts were not a federally recognized Indian tribe in 1934.

Under Department regulations, when the Secretary takes land into trust under Section 465, "none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, . . . shall be applicable . . . ." 25 C.F.R. §1.4(a). The Secretary possesses the discretion to require compliance with state and local law under 25 C.F.R. §1.4(b), but only if and when he determines it would "be in the best interest of the Indian owner or owners in achieving the highest and best use of such property[.]" In addition, the Department maintains that land taken into trust under Section 465 becomes Indian country within the meaning of 18 U.S.C. §1151. *See* Brief for the United States in Opposition, *Roberts v. United States*, No. 99-174, at 14-18 (2000). When

land becomes Indian country, "the Federal government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question." *Alaska v. Native Village of Venetie Tribal Gov't.,* 522 U.S. 520, 531 (1998).

IV. Factual and Procedural Background

A. The Parcel and Trust Taking Decision

In 1991, the Narragansett Indian Wetuomuck Housing Authority (the "WHA") purchased a 31 acre parcel to build a proposed housing complex. Pet. App. 87. The parcel was included in the 1975 land claim by the Tribe, but did not end up as part of the Settlement Lands. The WHA obtained financing for the purchase of the parcel and the construction of the housing complex from the United States Department of Housing and Urban Development ("HUD"). *Id*. at 88. In 1992 the WHA conveyed the parcel to the Tribe with a deed restriction to place the property in trust with the federal government to provide housing for tribal members. *Id*. There is no HUD or other federal requirement that land be in trust to obtain financing, or for the construction, or habitation of the housing development.

Litigation ensued when the Tribe began construction of the housing without the required state and local permits and approvals. *Narragansett Indian Tribe v. Narragansett Elec. Co.,* 878 F.Supp. 349 (D.R.I. 1995), *rev'd in part, aff'd in part,* 89 F.3d 908 (1st Cir. 1996). As the State argued and the district court found, the WHA's proposed housing project was detrimental to coastal and groundwater resources. *Id*.

at 355. The Tribe claimed, however, that the housing development was a "dependent Indian community" and thus "Indian country" pursuant to 18 U.S.C. §1151(b). The First Circuit ultimately held that the property was not Indian country because it was not owned or validly set aside by the federal government for the use and occupancy of the Tribe. 89 F.3d at 921.

Having failed in its first attempt to exempt the land from state regulation, the Tribe tried a different approach. Less than a year after the First Circuit's decision in *Narragansett Elec.*, the Tribe updated a pending trust application that had asked the Secretary to take the parcel in trust for the Tribe's benefit, based on its status as "a federally recognized and acknowledged Indian Tribe." Pet. App. 90.[11] The application and correspondence from the Tribe repeatedly requested that the land "be taken into trust free of State laws and regulation."[12] In March 1998, the Governor and Town of Charlestown were notified that the Secretary intended to take the 31 acre parcel into federal trust. Pet. App. 91; 162-64. The State, Governor, and Town appealed the Secretary's decision

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[11] Administrative Record (A.R.), Vol. I, Tab A (Narragansett Indian Tribal Resolution No. TC-93-0601 Trust). No members of the Tribe have ever sought trust lands based on the other two categories of "Indian" set forth in Section 479 of the IRA.

[12] Narragansett Indian Tribe of Rhode Island Trust Application dated July 17, 1997 (A.R. Vol. II, Tab D at 8) citing Memoranda of counsel dated Feb. 24, 1994 at 3 (A.R. Vol. II, Tab D, (5)) and Memoranda of counsel dated July 3, 1997 at 11 (A.R. Vol. II, Tab D, (6)).

to the Department's Board of Indian Appeals (IBIA), which affirmed. *Id*. at 91.

B. District Court Proceedings

The State, Governor, and Town ("Petitioners") appealed the IBIA decision to the United States District Court for the District of Rhode Island pursuant to the Administrative Procedures Act, 5 U.S.C. §706. Petitioners sought to enjoin the Secretary's action on a variety of grounds, including that it was contrary to the IRA and the Settlement Act. On cross-motions for summary judgment, the district court ruled in favor of the defendants. Pet. App. 84-136.

The district court rejected Petitioners' contention that, when Section 479 defines "Indian" to include "members of any recognized Indian tribe now under Federal jurisdiction," it referred to tribes under federal jurisdiction when Congress enacted the IRA, *i.e*., as of June 18, 1934. The court concluded that, so long as the Tribe existed in 1934 and is presently federally recognized, it qualifies as an "Indian tribe" within the meaning of that clause. Pet. App. 110-113.

The district court also rejected Petitioners' contention that the Settlement Act precludes the Secretary from taking Rhode Island land into trust for Indians and converting the land into Indian country. The court concluded that the Settlement Act does not expressly address the operation of Section 465, and that, "[a]lthough Sections 1705 and 1712 reveal an intent to resolve *all* claims . . . that are premised upon the Narragansetts' assertions of aboriginal right, the

provisions do not reveal an intent to otherwise restrict the tribe's legal rights and privileges," including the right to seek trust acquisition of land under Section 465 once it became federally recognized. Pet App. 117-19.

C. The First Circuit Opinions

A panel of the First Circuit initially found that the Secretary could take the parcel into trust, but did not address whether the land would be subject to state law and jurisdiction. 398 F.3d 22, 36 (1st Cir. 2005). The First Circuit granted rehearing and, over a dissent, affirmed the district court judgment. 423 F.3d 45 (1st Cir. 2005).

The court of appeals ordered rehearing en banc, Pet. App. 139-140, and by a 4-2 vote affirmed. *Id*. at 1-81. On the IRA issue, the majority admitted that "[o]ne might have an initial instinct to read the word 'now'" in the 1934 Act to "mean the date of enactment of the statute, June 18, 1934." *Id*. at 19. The court found, however, that "there is ambiguity as to whether to view the term 'now' as operating at the moment Congress enacted it or at the moment the Secretary invokes it." *Id*. at 19-20. The court concluded that neither the statutory context (such as the IRA's use of the phrase "now or hereafter" elsewhere), policy, nor legislative history resolved the ambiguity. *Id*. at 20-28. The court also dismissed the relevance of *United States v. John,* 437 U.S. 634, 649 (1978), where this Court stated that the "1934 Act defined 'Indians'" to include "'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction' . . . ." (brackets in original). The

court of appeals described that equation of "now" with "1934" as mere "musings" that fell short of "being dicta." Pet. App. 23. The court then held that the Secretary's interpretation of Section 479 is "permissible," and therefore deferred to it under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 29.

The First Circuit also ruled that the Settlement Act does not preclude the Secretary from taking Rhode Island land into trust under the IRA. Pet. App. 37-50. The court stated that the Act does not explicitly limit the Secretary's authority, that implied repeals are disfavored, and that the State did not meet its burden of establishing such a repeal here. *Id*. at 38-39. In particular, the court concluded that 25 U.S.C. §§1705 and 1712 are "most naturally read as merely resolving the claims that had clouded the titles of so much land in Rhode Island." Pet. App. 41. "However aboriginal title or ancient sovereignty was lost, the IRA provides an alternative means of establishing tribal sovereignty over land." *Id*. at 42. The court added that "[i]t would have been easy [for Congress] to extend the provisions of Section 1708(a) preserving state sovereignty [in the Settlement Lands] to cover all lands in Rhode Island owned by or held in trust for the Tribes." *Id*. at 47. Finally, while "[a]cknowledging the genuineness of the State's sense that its bargain has been upset," the court concluded that it lacked the authority to provide relief to the State. *Id*. at 48.

The dissent concluded that the Secretary's action conflicted with the language and intent of the Settlement Act. Judge Howard specifically found that Section 1705(a)(3) "forecloses any future 'Indian' land

claim of any type by the Tribe regarding land in Rhode Island. . . . Congress (and the parties) intended to resolve all the Tribe's land claims in the State once and for all." Pet. App. 74. He stated that "[i]t is neither logical nor necessary to find that Congress enacted legislation effectuating this carefully calibrated compromise between three sovereigns . . . only to permit the legislation to be completely subverted by subsequent agency action." *Id*. at 75. Judge Howard further observed that under the majority's reasoning, "the Tribe could swap the Settlement Lands for adjacent land and undo any limitations contained in the Settlement Act," which would be an "absurd result[]." *Id*. at 76. Judge Selya joined Judge Howard's dissent and added that the Act and its surrounding circumstances "suggests with unmistakable clarity that the parties intended to fashion a broad arrangement that preserved the State's civil, criminal, and regulatory jurisdiction over any and all lands within its borders." *Id*. at 79. In his view, "[i]t strains credulity to surmise, as does the majority, that the State would have made such substantial concessions including the transfer, free and clear, of 1800 acres of its land – while leaving open the gaping loophole that today's decision creates." *Id*. at 80.

After judgment entered, the First Circuit stayed the mandate of the judgment pending the Court's disposition of this case. Pet. App. 82-83.

SUMMARY OF THE ARGUMENT

I. Congress cabined the Secretary's authority to take land into trust under 25 U.S.C. §465 by limiting

who qualifies as an "Indian" for purposes of the IRA. In particular, where (as here) tribal membership is the purported basis of "Indian" status, the IRA only applies to "members of any recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. §479 (emphasis added). Congress enacted the IRA on June 18, 1934; the ordinary and natural meaning of that phrase to the Congressmen who adopted it is that the tribe had to be recognized and under federal jurisdiction as of June 18, 1934. Because the Narragansett Tribe was not federally recognized and not under federal jurisdiction until 1983, it does not qualify as a "recognized Indian tribe now under federal jurisdiction."

The First Circuit erred in concluding that the statute is ambiguous and that, therefore, the Secretary's interpretation is entitled to *Chevron* deference. The only ambiguity posited by the First Circuit was that "now" could mean the present day if read from the perspective of someone reading the statute today (or any time after its enactment). That is not how statutes are interpreted. This Court has repeatedly held that statutes are interpreted from the perspective of the enacting Congress. The meaning members of *that* Congress would give to words controls; and the intentions of members of *that* Congress bear on the statute's meaning. *See*, *e.g.*, *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 759 (1980) (in construing a word in a statute, "we may look to the contemporaneous understanding of the term"). The statutory context confirms that the word "now" in Section 479 refers to the date of the IRA's enactment. Other sections of the IRA use the phrases "now existing or established hereafter" and "now or

hereafter." This shows that when Congress wanted to encompass both the present and the future in the IRA it knew how to, and did not do so merely through the word "now." Moreover, the Secretary's interpretation would make the word "now" in Section 479 and the words "hereafter" in the other sections superfluous.

The statutory purpose and legislative history fully support that construction. The purpose of the IRA was to terminate the allotment policy and to undo some of the damage it caused. That purpose is most relevant to tribes that were federally recognized as of the statute's enactment and suffered under the allotment policy. And the legislative history shows that the word "now" was added to Section 479 based on the recommendation of the Commissioner of Indian Affairs, who stated that insertion of the word would "limit the act to Indians now under federal jurisdiction." Not surprisingly, the one time this Court construed Section 479, it read "now" to mean "1934." *John*, 437 U.S. at 649. That construction formed part of the Court's reasoning; it was not mere "musings." All told, Congress unquestionably answered the "precise question" presented here. The Secretary's interpretation, which repudiates that answer, must be rejected.

II. The second limit on the Secretary's ability to take Rhode Island land into trust is the Settlement Act. The Tribe, the State, and Congress came together in 1978 and comprehensively settled all claims to tribal land in Rhode Island. The unconditional language of the JMOU states that, in exchange for 1,800 acres of settlement lands, "Federal legislation shall be obtained that eliminates all Indian claims of

any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." J.A. 24a-25a. The plain language of 25 U.S.C. §1705(a)(3) accomplished that objective. It states that "all claims . . . arising subsequent[ly]" that are "based upon any interest in or right involving such land" – such as the claim that the 31 acres are Indian country and therefore immune from the State's laws and jurisdiction – "shall be regarded as extinguished as of the date of the transfer" of the 31 acres. The Tribe and the Secretary may not now seek to undo this extinguishment, and the parties' carefully wrought agreement, by resort to a land-into-trust application under Section 465. Congress has ordained otherwise.

By taking Rhode Island land into trust, and thereby creating federal Indian country for the first time in Rhode Island, the Secretary contravened the structure and context of the Settlement Act. The benefit the Tribe received in the JMOU and resulting Act was the use of the Settlement Lands, located in the heart of the Tribe's aboriginal home. Even there, though, the Settlement Act specified that state law applies, with only certain limited exceptions. Under the Secretary's position, however, state law can be ousted everywhere else in the State. Instead of being the place where tribal power is greatest, the Settlement Lands become the only place in the State that cannot become Indian country – a result that no one, including Congress, could possibly have intended. The Secretary's position also conflicts with Congress's intent to make the Settlement Act consistent with ANCSA, which has been long understood to preclude Alaska land from being taken into trust under Section 465.

The bottom line is the Secretary's position allows the Tribe to obtain everything it willingly bargained away in the JMOU and Settlement Act. The Tribe filed its 1975 lawsuit claiming aboriginal title and use and occupancy rights in the hope of obtaining sovereignty over Rhode Island lands and diminishing the State's sovereignty over those lands. That is precisely what occurs when the Secretary takes land into trust under Section 465. When land becomes Indian country, "the Federal government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question." *Native Village of Venetie,* 522 U.S. at 531. The Tribe settled its claims, however, and abandoned them in exchange for the 1,800 acres of Settlement Lands. This Court should give effect to the bargain reached in 1978 and codified by Congress, and bar any further "Indian occupied" lands in Rhode Island.

ARGUMENT

I. The Indian Reorganization Act Of 1934 Cannot Be Applied To The Narragansett Indian Tribe.

The 1934 IRA allows the Secretary of the Interior to take land into trust for, among others, "all persons of Indian descent who are members of any recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. §479 (emphasis added). At issue is whether Section 479 authorizes the Secretary to take land into trust on behalf of the Narragansett Indian Tribe – which was not federally recognized until almost 50 years after the IRA's enactment. The answer is unequivocally no. Statutes are construed from the perspective of the

Congresses that enacted them, and a member of Congress reading Section 479 in 1934 would naturally have read "now" to refer to the IRA's date of enactment, June 18, 1934. Moreover, only that construction is consistent with the IRA's use of the term "hereafter" in several other sections, gives the word "now" any meaning, and fulfills the statute's legislative purpose.

That is precisely how this Court interpreted the phrase in *United States v. John*, when it stated that Congress in the IRA "defined" the term "Indians" to include "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction." 437 U.S. at 649 (brackets in original). The Court in *John* did not engage in a full-blown statutory construction analysis of the phrase. But its reading of the provision was necessary to the resolution of the case, and it is the only plausible reading of the language. The First Circuit therefore erred in giving *Chevron* deference to the Secretary's position that the term "now" in Section 479 means "now and hereafter."

A. The Plain Language And Statutory Context Compel The Conclusion That The Term "Now" In Section 479 Means The Date Of The IRA's Enactment.

When Congress enacted the IRA, the plain meaning of the phrase "all persons of Indian descent who are members of any recognized Indian tribe *now* under federal jurisdiction" could not have been clearer: it referred to tribes under federal jurisdiction as of June 18, 1934. That meaning has not changed. The First

Circuit, however, adopting the Secretary's position, concluded "there is ambiguity as to whether to view the term 'now' as operating at the moment Congress enacted it or at the moment the Secretary invokes it." Pet. App. 19-20. In the First Circuit's view, it is unclear whether to read the statute from the perspective of a member of Congress in 1934, in which case "now" means June 18, 1934, or from the perspective of a person reading the statute years in the future, in which case "now" can mean that future year. This Court has repeatedly held, however, that statutes are construed from the perspective of the enacting Congress. The statutory context further confirms that "now" necessarily means June 18, 1934.

1. The IRA, like all federal statutes, must be read from the perspective of a member of the enacting Congress, which makes the ambiguity posited by the Secretary disappear. A member of Congress in 1934 reading the phrase "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction" would construe "now" to mean June 18, 1934. That construction is dispositive.

The various tools of statutory construction – plain language, statutory structure and context, drafting history, legislative history, etc. – have one thing in common: they all focus on the Congress that enacted the statute. The questions they seek to answer are "What did the statutory terms mean to the members of Congress who voted on the bill?", and "What was the intent of those members of Congress?"

It is well established that "[s]tatutory construction must begin with the language employed by Congress

and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks and citation omitted). And the relevant meaning of statutory terms is their meaning on the date of enactment. *See Lorillard v. Pons,* 434 U.S. 575, 583 (1978) ("where words are employed in a statute which had *at the time* a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary") (emphasis added). Thus, in construing a word in a statute, "we may look to the contemporaneous understanding of the term." *Roadway Express, Inc.,* 447 U.S. at 759; *see also Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of th[e] text as any ordinary Member of Congress would have read them, see [Oliver Wendell] Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899), and apply the meaning so determined.").

For example, in *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 873 (1999), the Court assessed whether coalbed methane gas constituted "coal" within the meaning of the Coal Lands Acts of 1909 and 1910 based not on "what scientists know today," but on "whether Congress so regarded it in 1909 and 1910." The Court concluded "that the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance," not the gas. *Id*. at 874.

Because statutes are construed based on their meaning as of the date of enactment, this Court often

employs decades-old dictionaries to construe statutory terms. Two recent examples are *Permanent Mission of India v. City of New York*, 551 U.S. ___, 127 S. Ct. 2352, 2356 (2007) (construing an exception in the Foreign Sovereign Immunities Act of 1976 with the aid of a 1951 edition of *Black's Law Dictionary*); and *BP America Prod. Co. v. Burton*, 549 U.S. 84, 127 S. Ct. 638, 643-44 (2006) (construing a statute enacted in 1966 with the aid of a 1951 edition of *Black's Law Dictionary*).

Other tools of statutory construction similarly focus on the enacting Congress. The obvious purpose of inquiring into the background factors that motivated Congress to act is to help determine the enacting Congress's intent. *See*, *e.g.*, *LaRue v. DeWolff, Boberg & Assoc.*, 552 U.S. ___, 128 S. Ct. 1020, 1025 (2008) (discussing the "risk that prompted Congress" to enact ERISA and "the kinds of harms that concerned the draftsmen of" the provision at issue). And "[t]hose . . . who look to legislative history," *Doe v. Chao*, 540 U.S. 614, 626 (2004), do so in the interest of "consider[ing] all available evidence of Congress'[s] true intent when interpreting its work product." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) (footnote omitted). The various components of legislative history – committee reports, hearings, floor statements, and the like – help to understand what was in the minds of the drafters of the legislation. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 861 (1992) ("in certain contexts reference to legislative history can promote interpretations that more closely correspond to the expectations of those who helped create the law"). Conversely, the views of

later Congresses cannot change the meaning of a statute. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199-200 (1963) ("[T]he intent of Congress must be culled from the events surrounding the passage of the 1940 legislation. [O]pinions attributed to a Congress twenty years after the event cannot be considered evidence of the intent of the Congress of 1940.") (internal citation and quotation marks omitted).

This may seem obvious, but it is necessary to demonstrate the basic flaw in the First Circuit's reasoning. To determine the meaning of a statute, one stands in the shoes of its enactors, not in the shoes of persons who might read the statute 50 years later. The only meaning a Congressman in 1934 would have given the phrase "any recognized Indian tribe now under federal jurisdiction" is a recognized tribe that, as of 1934, was under federal jurisdiction. That ordinary meaning controls. *See BP America Prod. Co.*, 127 S. Ct. at 643 ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

2. Reading "now" to mean "now as of 1934" is also compelled by the statutory context. *See Koons Buick*, 543 U.S. at 60 ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). In the IRA, Congress clearly articulated when it wanted a provision or clause to apply prospectively. In Section 8 of the IRA, 25 U.S.C. §468, Congress provided that the Act does not apply to certain Indian holdings "outside the geographic boundaries of any Indian reservation now existing or

established hereafter." And in Section 12, 25 U.S.C. §472, Congress required the Secretary to establish standards for appointment "to the various positions maintained, now or hereafter, by the [BIA]." Congress's inclusion of the words "established hereafter" and "hereafter" following the word "now" in Sections 468 and 472, but not after the word "now" in Section 479, is telling. As this Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citations omitted). By excluding "hereafter" in Section 479, Congress expressed its intent that tribes recognized "hereafter" – after June 18, 1934 – not be embraced within the definition.

The Secretary's construction of Section 479 also violates the "cardinal principle of statutory construction" that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker,* 533 U.S. 167, 174 (2001) (internal quotation marks omitted). The Secretary's construction does this in two ways. First, it renders the term "now" in Section 479 meaningless. If any federally recognized tribe was covered by the phrase "any recognized Indian tribe now under federal jurisdiction," the word "now" would be unnecessary. Second, the Secretary's reading renders the words "established hereafter" and "hereafter" in Sections 468 and 472 superfluous. If the IRA is properly read from the perspective of a person reading the statute some

years post-enactment (for example, the Secretary in 1983), the word "now" would cover all present-day reservations (in the case of Section 468) and all positions presently maintained (in the case of Section 472). The words "established hereafter" and "hereafter" would add nothing.

3. Reading "now" in Section 479 to mean the date of the IRA's enactment is consistent with this Court's construction of the term "now" in a series of cases involving an immigration statute. The Act of April 14, 1802, 2 Stat. 155, provided that "children of persons who *now are*, or have been, citizens of the United States, shall, though born out of the limits of the jurisdiction of the United States, be considered as citizens thereof" (emphasis added). Congress reenacted the statute in 1872. In *Montana v. Kennedy*, 366 U.S. 308, 311-12 (1961), this Court found that Congress intended the 1802 provision to have retrospective application only – to "grant[] citizenship to the foreign-born children only of persons who were citizens of the United States on or before the effective date of the statute (April 14, 1802)." This Court further found that Congress amended the statute to make it prospective as well by removing the words of limitation – "now are or have been" – and replacing them with "heretofore born or hereafter born." *Id*. at 310. The Court reached the same conclusion in two prior cases. *See United States v. Wong Kim Ark*, 169 U.S. 649, 673-74 (1898); *Weedin v. Chin Bow*, 274 U.S. 657, 663-64 (1927).

The First Circuit countered that "Congress sometimes uses the word 'now' to refer to a time other than the moment of enactment," citing *Difford v. Sec.*

of Health and Human Services, 910 F.2d 1316 (6th Cir. 1990). Pet. App. 20. That case involved application of the Social Security Benefits Amendments of 1984, which established standards for determining when benefits may be withdrawn from persons who are no longer disabled. Congress provided that the benefits decision shall be based on "new evidence concerning the individual's prior or current condition," as well as on whether "the individual is now able to engage in substantial gainful activity." 42 U.S.C. §423(f). All that statute proves is that in an altogether different statutory context the term "now" can refer to a future time. In fact, the phrase "now and hereafter" would have made no sense in the context of Section 423(f), which by its very nature is addressing an event that takes place after the statute's enactment. This rare situation, where the term "now" necessarily refers to a future time, does not change the general rule that statutes are read from the perspective of their framers. And it does not create ambiguity in the IRA, where the only sensible reading of the term "now" – from the perspective of a Congressman in 1934 – is that it refers to 1934.

The First Circuit had only one response with respect to how other provisions of the IRA bear on the meaning of "now" in Section 479. Describing one of the Secretary's arguments, the court noted that "section 479 itself specifies the date of 'June 1, 1934' as the relevant date for determining eligibility based on 'residing within the present boundaries of any Indian reservation.'" Pet. App. 20. According to the Secretary, this shows that "had Congress wanted to require recognition of a tribe on the date of enactment, it would have specified that date, rather than using

the term 'now.'" *Id*. at 21. The logic of this argument is hard to grasp. Congress could not have used the word "now" in place of "June 1, 1934" because the date of enactment ("now") was June *18*, 1934. The only way to specify the date June 1, 1934 was to use that precise date. And even if Congress had used the date "June 18, 1934" elsewhere in the IRA, it would have proved nothing. Congress could have expressed the date June 18, 1934 as "now," "the date of enactment," or "June 18, 1934." There would be nothing strange or unusual about Congress picking and choosing among those options depending on the phrasing and syntax of particular sentences.[13] In the end, Congress's decision to use a specific date in one provision of the statute hardly suggests that Congress intended the word "now" to mean "now and hereafter."

B. The Purpose And Legislative History Of The IRA Support Construing The Term "Now" In Section 479 To Mean The Date Of Enactment.

This Court has recognized that the purpose of the IRA was to bring the federal government's "policy of allotment … to an abrupt end." *Confederated Tribes of Yakima Nation*, 502 U.S. at 255. "The objectives of the allotment policy were simple and clear cut: to

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[13] The First Circuit referred to 25 U.S.C. §478 as requiring elections to be held "within one year after June 18, 1934." Pet. App. 21. That is not how the statute read when passed. As enacted by Congress in 1934, Section 18 (25 U.S.C. §478) referred to "within one year after the passage and approval of this Act." *See* 48 Stat. 988.

extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id*. at 254 (citing *In re Heff*, 197 U.S. 488, 499 (1905)). Congress enacted the IRA to "[r]eturn to the principles of tribal self-determination and self-governance which had characterized the" pre-allotment policy. *Id*. at 255. Put slightly differently, the "intent and purpose of the" IRA "was to rehabilitate the Indian's economic life and to give him a chance to develop the initiatives destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

Those objectives have no foothold in Rhode Island, where there has never been any federal allotments or surplus lands, or any Indian tribes that were subject to that federal policy. More generally, those objectives have far less footing with respect to tribes that were not recognized as of 1934. Only tribes federally recognized by 1934 had their "tribal sovereignty" "extinguish[ed]" by the allotment policy and only such tribes needed a "[r]eturn to the principles of tribal self-determination and self-governance." Limiting the IRA's application to tribes recognized as of 1934, therefore, fully comports with the statute's underlying purposes.

The legislative history confirms that Section 479 was intended to reach only tribes that were subject to the pre-1934 allotment policy. The original version of Section 19 of the IRA read as follows:

> The term 'Indian' as used in this act shall include all persons of Indian descent who are members of any recognized Indian tribe, and all

> persons who are descendants of such members who were, on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all persons of one-fourth or more Indian blood.

Hearing on S.2755 before the S. Comm. on Indian Affairs, 73d Cong. 264 (May 17, 1934) ("Senate Hearing"). Congress modified this initial bill to make its scope more restrictive in two specific respects. First, with respect to the final category, Congress raised the blood requirement from one-fourth or more to one-half or more Indian blood. Second, and bearing precisely on the issue here, Congress changed "all persons of Indian descent who are members of any recognized Indian tribe" to "all persons of Indian descent who are members of any recognized Indian tribe *now under federal jurisdiction*."

The latter change arose directly from a colloquy during the Senate hearings between the Commissioner of Indian Affairs, John Collier, and members of Congress:

> The Chairman: But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their

> lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.
>
> Senator O'Mahoney: If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.
>
> Commissioner Collier: Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Senate Hearing at 266-67. With that, the temporal limitation made its way into the IRA. And the person who proposed adding the phrase in dispute publicly stated that its effect would be to "limit the act to the Indians now under federal jurisdiction."

The First Circuit sought to diminish the import of Commissioner Collier's statement by noting that his solution to the Chairman's concern was not a very good one, being both ineffective (by allowing the IRA to apply to those California tribes "under the supervision of the Government of the United States" if they were "now under federal jurisdiction") and arbitrary (because Indians might be excluded from the IRA based on their tribes' status, not on their own Indian blood). Pet. App. 25. The efficacy of Commissioner Collier's solution is beside the point. Congress adopted

it after he expressly declared that it "would limit the act to the Indians now under federal jurisdiction." The First Circuit's assertion that "it is not clear whether ['now under federal jurisdiction'] was intended as a temporal limitation" cannot be taken seriously.[14]

C. In *United States v. John*, This Court Construed The Term "Now" In Section 479 To Mean The Date of Enactment.

As noted above, in *United States v. John*, this Court stated that the IRA "defined" the term "Indians" to include "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction." 437 U.S. at 649 (brackets in original). The First Circuit brushed aside this interpretation as mere "musings" that fell "short of being dicta." Pet. App. 23. That characterization of *John* missed the mark. The Court's construction of Section 479 *did* matter to its holding in the case. And its reading of "now" to mean "1934" strongly supports the conclusion that, in the words of *Chevron*, "Congress has directly spoken to the precise question at issue."

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[14] Further support in the legislative history for the proposition that its focus was on tribes subjected to the allotment policy is the following statement by Representative Edgar Howard, who co-sponsored the IRA: "For purposes of this act, [the definitional section] defines the persons who shall be classed as Indians. In essence it *recognizes the status quo* over the present reservation Indians and further includes all other persons of one-fourth Indian blood." Congressional Debate on Wheeler-Howard Bill (1934), *reprinted in The American Indian and United States*, Vol. III. (1973) (emphasis added).

At issue in *John* was whether land within the reservation of the Mississippi Band of Choctaw Indians constituted "Indian country" under 18 U.S.C. §1151. If it did, federal courts had jurisdiction over certain crimes committed on the reservation, and state courts did not. 437 U.S. at 635-37. To make that determination, the Court reviewed the long and difficult history of the Mississippi Choctaws. In short, in 1833 the Choctaw Indians entered into the Treaty at Dancing Rabbit Creek with the United States. In the Treaty, the Choctaws ceded ten million acres of land east of the Mississippi River to the federal government and in return were removed to the west. *Id*. at 641. Some of the Choctaws, however, remained in Mississippi. The Federal Government became "acutely aware" of that in the 1890's, and starting in 1918, Congress began appropriating funds to assist the Choctaws and to purchase land for individual Indians there. *Id*. at 643, 644.

The IRA accelerated the pace of change for the Mississippi Choctaws. They "were among the many groups who, before the legislation was enacted, voted to support its passage." *Id*. at 645. And within a year of its enactment, pursuant to Section 18, 25 U.S.C. §478, they voted to accept its provisions. *John*, 437 U.S. at 645-46. In 1939, Congress passed another Act, which provided that "title to all the lands previously purchased for the Mississippi Choctaws would be [held] 'in the [name of the] United States in trust for such Choctaw Indians of one-half or more Indian blood'" then residing in Mississippi. *Id*. at 646 (citing Ch. 235, 53 Stat. 851). Finally, in 1944, the Secretary of the Interior – based on the 1939 act – proclaimed the land held in trust for the Mississippi Choctaws as

a reservation "for the benefit of those members … of one-half or more Indian blood." *Id*. In April 1945, the Mississippi Choctaws adopted a constitution pursuant to the IRA, which the Secretary quickly approved. *Id*.

With that background, the Court held that the Mississippi Choctaw reservation was "Indian country," concluding it became a "reservation" for purposes of Section 1151 in 1939 and, "if there were any doubt about the matter," in 1944. But the Court still had to respond to the lower courts' holding "that the 1944 proclamation had no effect because the [IRA] was not intended to apply to the Mississippi Choctaws." 437 U.S. at 649. The Court rejected that contention, stating:

> The 1934 Act defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under federal jurisdiction," and their descendents who then were residing on any Indian reservation, but also as "all other persons of one-half or more Indian blood."

Id. at 650. The Court ruled that "[t]here is no doubt that persons of this description [persons of one-half or more Indian blood] lived in Mississippi, and were recognized as such by Congress and by the Department of Interior, at the time the [IRA] was passed"; "the Mississippi Choctaws were [therefore] not excepted from the general operation of the 1934 Act." *Id*.

Had the Court not concluded that "members of any recognized Indian tribe now under federal jurisdiction"

looked to the tribe's status in 1934, its reasoning would have been different. Although the Mississippi Choctaws were not recognized and under federal supervision as of 1934, they were by 1945. *See John*, 437 U.S. at 646 (observing that, "as anticipated by" Section 16 of the IRA, 25 U.S.C. §476, "the Mississippi Band of Choctaw Indians adopted a constitution and bylaws"); 25 U.S.C. §476 (authorizing "[a]ny Indian tribe, or tribes, residing on the same reservation" to adopt a constitution and bylaws). Were the Secretary's position here correct, the Court could have rejected the lower courts' contention that the IRA "was not intended to apply to the Mississippi Choctaws" on that ground alone. Instead, the Court looked to the final definition of "Indians," which was "persons of one-half or more Indian blood." The Court's construction of "members of any recognized Indian tribe now under federal jurisdiction" as dependent on the date of 1934 was far more than mere "musings."

Not surprisingly, all the circuit courts to consider Section 479 (other than the First Circuit) have interpreted it in the same manner as this Court in *John*. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) (express language of Section 479 did not encompass any native Hawaiian group because there "were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii"); *United States v. State Tax Comm'n.*, 505 F.2d 633, 642 (5th Cir. 1974) (Section 479 "positively dictates that tribal status is to be determined as of June, 1934").

D. The Secretary's Erroneous Interpretation Of Section 479 Is Not Entitled To *Chevron* Deference.

Under the first step of *Chevron*, a reviewing court must determine "whether Congress has directly spoken to the precise question at issue" by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 842. If Congress has answered the "precise question," the Court must reject an agency interpretation of a statute that is contrary to the Congress's expressed intent. *Id*. at 843. In this case, the "precise question" is whether Congress intended the phrase "any recognized Indian tribe now under federal jurisdiction" in Section 479 to embrace only tribes that were federally recognized and under federal jurisdiction on the date of the IRA's passage. For the reasons set out above, Congress *did* answer that "precise question," and its answer was yes.

Deference to an agency interpretation of a statute is permissible "only when the devices of judicial construction have been tried and found to yield no clear sense of Congressional intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron*, 467 U.S. at 843 n.9). Where "regular interpretive method" of statutory construction, however, "leaves no serious question," the agency is not entitled to *Chevron* deference. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). *Chevron* deference is therefore not granted simply because agencies are involved and a statute is claimed to be ambiguous. *Gonzalez v. Oregon*, 546 U.S. 243, 258 (2006). Under these basic principles, the Secretary's flawed construction of Section 479 does not merit deference.

The Secretary lacks the authority to take lands into trust under the IRA for the Narragansett Tribe, which did not become federally recognized or under federal jurisdiction until 1983. The 31 acre parcel in Charlestown, Rhode Island cannot, therefore, become trust land.

II. The Settlement Act Precludes The Secretary From Taking Rhode Island Land Into Trust For An Indian Tribe.

This case arises out of the settlement of lawsuits brought by the Narragansett Tribe that sought to establish its aboriginal title to 3,200 acres of land acquired by the State and various landowners in alleged violation of the Trade and Intercourse Acts. The parties' settlement of the dispute involved a straightforward *quid pro quo*: the Tribe received 1,800 acres of land – the heart of its sovereign aboriginal home – to be held in permanent state trust, where it could apply its own hunting and fishing regulations; in exchange, aboriginal title and all other claims to land anywhere in Rhode Island by the Narragansett Tribe and any other tribe were extinguished. The Settlement Act, 25 U.S.C. §1701 *et seq*., codified that agreement. No longer could the Tribe, any of its members, any other tribe, or any other tribe's members claim sovereign regulatory authority over land in Rhode Island by virtue of their tribal or Indian status.

Under the Secretary's reading of the Settlement Act, which the First Circuit adopted, the Secretary has authority to eviscerate the benefits the State obtained from the settlement and the Act. In his view, the

Secretary is free to take tens of thousands of acres of land anywhere in Rhode Island into trust for Indian tribes, thereby converting that land into Indian country and severely compromising the application of state law there. Beyond the obvious violence that would do to the parties' bargain, it cannot be squared with the plain language and structure of the Settlement Act. The *quo* Rhode Island obtained in exchange for the *quid* of providing the Tribe 1,800 acres of its ancestral land was not a mere temporary extinguishment of aboriginal title and Indian country in the State.

A. The Settlement Act Extinguished All Present And Future Tribal Claims Of Sovereign Authority Over Land Within The State.

1. Congress extinguished all aboriginal title and all other tribal land claims within the State through two provisions of the Settlement Act: 25 U.S.C. §§1705 and 1712. Section 1705, through a three-step process, specifically extinguished the Tribe's claims within the State. The provision first decreed that, upon the satisfaction of certain conditions by the State (which occurred shortly after passage), "any transfer of land . . . anywhere within the United States from, by, or on behalf of . . . the Narragansett Tribe of Indians,. . . shall be deemed to have been made in accordance with the Constitution" and all pertinent federal statutes, including the Trade and Intercourse Act. Section 1705(a)(1). Subsection (a)(2) then provides that, "to the extent" any such transfer "may involve land" where the Narragansetts "had aboriginal title, subsection (a) of this section shall be regarded as an

extinguishment of such aboriginal title as of the date of said transfer." Finally, subsection (a)(3) declares that, as to any transfer of land subject to subsections (a)(1) and (a)(2), "all claims against . . . any State or subdivision thereof . . . by . . . the Narragansett Tribe of Indians, or any . . . successor in interest, [or] member . . . arising subsequent to the transfer and based upon any interest in or right involving such land . . . (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer."

Section 1712 uses virtually identical language, but its scope is different. It applies to transfers "of land . . . located anywhere within the State" (whereas Section 1705 applies nationwide); but it applies to transfers made "from, by, or on behalf of any Indian, Indian nation, or tribe of Indians" (whereas Section 1705 applies only to the Narragansetts). Taken together, Sections 1705 and 1712 extinguish all tribal land claims by the Narragansetts nationwide, and all tribal land claims by any Indian tribe or member within Rhode Island. Critically for the settlement, these provisions do not merely speak to the validity and impact of *past* transfers of land; by their terms they operate prospectively as well.

To understand the forward-looking nature of the Settlement Act, it is critical to recall that the Narragansetts were once the aboriginal occupants of what is now Rhode Island. *See*, *supra*, nn.1, 3. Accordingly, when Sections 1705(a)(3) and 1712(a)(3) state that "all claims . . . arising *subsequent to* the transfer and based upon any interest in or right

involving such land . . . shall be regarded as extinguished as of the date of the transfer" (emphasis added), they extinguish all future claims by the Tribe and its members, or any successor interest to any lands within the State. This extinguishment of *future* land-acquisition claims necessarily extends to seeking Secretarial action under 25 U.S.C. §465, the intended effect of which is to defeat application of ordinary state law by transferring to Indians equitable title to land.

The invalidity of the Secretary's action is highlighted by a straightforward application of the statutory language to the transaction. The 31 acres in question are among the lands that the Tribe sought to obtain in its original lawsuits; there is no serious dispute that they were lands transferred by the Tribe well before enactment of the Settlement Act. Section 1705(a)(1) deems that prior transfer of 31 acres legal as a matter of federal law. Section 1705(a)(2) decrees the "extinguishment of [any] aboriginal title" in the 31 acres "as of the date of said transfer." And Section 1705(a)(3) states that "all claims against . . . any State or subdivision thereof . . . arising subsequent to the transfer" of the 31 acres "and based upon any interest in or right involving such land" – such as the claim that the 31 acres are Indian country and therefore immune from the State's laws and jurisdiction – "shall be regarded as extinguished as of the date of the transfer" of the 31 acres. The Tribe undoes this extinguishment of its claims when it resorts to a land-into-trust application under Section 465; having agreed to be subject to Rhode Island law generally, it cannot seek a secretarial action to defeat the application of such law.

2. The structure of the Settlement Act and the context in which it was enacted confirm this. First, the core benefit of the agreement to the Tribe was that it would obtain use and occupancy of the 1,800 acres located at the very heart of its aboriginal lands. Yet even there, the Settlement Act provides that, with the exception of hunting and fishing regulations, "the civil and criminal laws and jurisdiction of the State of Rhode Island" shall apply. 25 U.S.C. §§1706(3), 1708(a). Allowing the Secretary to take any further Rhode Island lands into trust for the Tribe would produce the absurd result that the State's civil and criminal laws and jurisdiction can be reduced or eliminated anywhere in the State *except for one place* – the Settlement Lands. Instead of being the lands where Tribal power is at its zenith within the State, the Settlement Lands would be where potential Tribal sovereignty is at its nadir. As Judge Howard observed, the "Tribe could swap the Settlement Lands for adjacent land and undo any limitations contained in the Settlement Act." Pet. App. 76. It is inconceivable that Congress – whose principal object was to ratify the parties' settlement agreement – would have intended or countenanced such an outcome.

Second, the Settlement Act is the direct outgrowth of the bargain reached among the parties to resolve the Narragansetts' lawsuits. The first five paragraphs of the JMOU pertain to the establishment of the 1,800 acres of Settlement Lands. J.A. 22a-23a. Paragraph 6 of the JMOU then declares "[t]hat Federal legislation shall be obtained that eliminates all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." J.A. 24a-25a. The language is unconditional. It does not say, "eliminates

all Indian claims of any kind *up until the point at which the Secretary, in his virtually unfettered discretion, reestablishes them*."

Third, in effectuating that intent, Congress used "language [that] was consistent with the extinguishment language used in the Alaska Native Claims Settlement Act, 43 U.S.C. §1603(b)" and stated "that ANCSA instituted the relevant precedent for extinguishment in a settlement context." H.R. Rep. 95-1453 at 1953. In 1993, the Solicitor of the Department of the Interior reaffirmed a 1978 Solicitor opinion that the intent and purpose of ANCSA prohibits trust acquisitions by the Secretary. *See* U. S. Dept. of Interior Sol. Op. M-36975 at 107-08, 123 n.296 (Jan. 19, 1993). The Solicitor recognized that "ANCSA did reflect a new approach on an unprecedented scale in defining the relationship between the Alaska Natives and the Federal Government." *Id*. at 107. "Most significantly, the land and money assets provided in exchange for the extinguishment of Native claims were distributed to" new "state-chartered corporate organizations" rather than "existing IRA or traditional Native village organizations." *Id*. at 107-08. He concluded "Congress left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers." *Id.* The Secretary has abided by that policy, and has not taken land into trust on behalf of tribes since ANCSA's enactment. Given the intended marked resemblance between ANCSA §1603 and §§1705(a) and 1712(a) of the Settlement Act, the same result should obtain here.

The extinguishment provision of ANCSA is certainly no broader than the parallel provision in the

Settlement Act. ANCSA §1603 provides that "[a]ll aboriginal titles . . . in Alaska . . . are hereby extinguished," and declares that "[a]ll claims against . . . the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska . . . are hereby extinguished." It is true that ANCSA's Congressional Findings and Declaration of Policy states that settlement of the parties' dispute should be accomplished "without creating a reservation system or lengthy wardship or trusteeship," 43 U.S.C. §1601(b) – language that does not appear in the Settlement Act. Declarations of policy, however, are not operative law; it is the substantive provisions – such as Section 1603 – that determine the rights affected by a statute. *See Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 176 (1989) (a court "must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate"). If the substantive provisions of ANCSA eliminated the Secretary's authority to take land into trust, so too did the similarly worded substantive provisions of the Settlement Act.

Finally, the Secretary's action is also inconsistent with Section 1707(c) of the Settlement Act, which states that "[u]pon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to" the Tribe "or the settlement lands." It makes no sense to argue, as respondents essentially do, that the Secretary has a duty to take land into trust under Section 465 *outside* the Settlement Area when he is

relieved of any obligation or authority to do so *within* such area.

3. The First Circuit "[a]cknowledg[ed] the genuineness of the State's sense that its bargain has been upset," but concluded that the Settlement Act's language compelled it to up-end the settled agreement. Pet. App. 48. It did not. None of the reasons posited by the First Circuit for its conclusion that the Settlement Act permits future acquisitions of trust land under the IRA has merit.

Most fundamentally, the court reasoned that, although Sections 1705 and 1712 "extinguish claims based on the purported invalidity of th[e] transfers" referred to in subsection (a)(1), "the IRA provides an alternative means of establishing tribal sovereignty over land." Pet. App. 41-42. That reasoning fails to account for subsection (a)(3), which specifically extinguishes tribal-based claims "arising *subsequent to* the transfer" (emphasis added). The First Circuit construed subsection (a)(3) as merely "cover[ing] claims based on other forms of title, besides aboriginal title, that the Tribe may have held to land in Rhode Island *prior* to the Settlement Act." Pet. App. 43 (emphasis added). Nothing in subsection (a)(3), however, limits its scope in that way. Instead, it explicitly extends into the future. Given the choice between construing the provision to effectuate the agreement Congress was ratifying and construing the provision to undermine that agreement, the court wrongly chose the latter alternative.

The First Circuit justified that choice, in part, by concluding that the State's construction "proves too

much." Pet. App. 43. Specifically, the court believed that the State's reading of the Act would bar the Tribe and its members from asserting "traditional property claims" – an outcome Congress and the parties did not intend. *Id*. Once again, the First Circuit failed to read the Settlement Act in a manner consistent with its manifest objectives. In the JMOU, the Tribe and the parties took great care to expressly state that the required federal legislation "shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island." JMOU ¶6; J.A. 23a-24a. The House Report reiterated that objective, stating that the "extinguishment of Indian land claims is limited to those claims raised by Indians *qua* Indians, and is not intended to affect or eliminate the claim of any Indian under any law generally applicable to Indians as well as non-Indians." H.R. Rep. 95-1453 at 1955.

The language of Sections 1705(a)(3) and 1712(a)(3) is fully consistent with the narrow reading the parties and Congress plainly intended. The statute as a whole is entirely focused on the rights and interests of the sovereign "Narragansett Tribe of Indians" as Indians *qua* Indians to unique Indian land claims such as aboriginal title. When subsection (a)(3) speaks of "claims . . . based upon any interest in or right involving such land," Congress was speaking of tribal "interest[s]" or "right[s]" such as aboriginal title that are tied to the land based upon Indian occupancy. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) (based on prior subject matter of statute, the term "failure to act" means "failure to take an *agency action*"). The conundrum posited by the First Circuit

is therefore a false one. The purpose of the JMOU and the ratifying legislation was to categorically remove for all time any dispensation from the applicability of Rhode Island law based on Indian occupancy of land except as specifically agreed upon with respect to the Settlement Lands.

Next, the First Circuit pointed to two subsequent Settlement Acts that more explicitly bar the Secretary from taking land into trust under the IRA. Pet. App. 46, 47 (citing the Mashantucket Pequot Settlement Act, 25 U.S.C. §§1752(7), 1754(b)(8), and the Maine Indian Claims Settlement Act, 25 U.S.C. §1724(e)). Neither settlement act supports the First Circuit's holding. Indeed, none of the cited provisions mentions the IRA or Section 465; instead each of these settlement acts provides independent authority for taking land into trust. Although those provisions do preclude the Secretary from holding certain land in trust for tribes, the sections immediately preceding them specifically *require* the Secretary to hold other land in trust for tribes. *See* Mashantucket Settlement Act, 25 U.S.C. §1754(b)(7) (requiring certain lands to be held in trust by the Secretary for the Pequots); Maine Indian Claims Settlement Act, 25 U.S.C. §1724(d) (same as to Maine Indians). Nothing in these later settlement acts, therefore, refutes the conclusion that the Settlement Act's extinguishment sections, Sections 1705(a) and 1712(a), preclude the future taking of Rhode Island land into trust.

Finally, the First Circuit reasoned that the Settlement Act does not foreclose the Secretary from taking land into trust under Section 465 because "what is at issue is not what the *Tribe* may do in the exercise

of its rights, but what the *Secretary* may do." Pet. App. 44. That argument fails for several reasons. First, the Tribe is asserting immunity from state and local laws, not the Secretary. Second, the Tribe initiated the trust process by applying to the Secretary; the Secretary did not unilaterally seek to take this land into trust. And third, the Settlement Act bars claims not only by the Tribe and its members, but also by "successors in interest" to them. 25 U.S.C. §1705(a)(3). When the Secretary takes land into trust on behalf of the Tribe, he becomes the successor in fee title interest to the Tribe.

B. Were The Secretary Permitted To Take Rhode Island Land Into Trust For The Tribe, It Would Give The Tribe Precisely What It Relinquished In The JMOU And Settlement Act.

Through the JMOU, as ratified in the Settlement Act, the Tribe agreed to relinquish all aboriginal title and all claims to use and occupancy with respect to Rhode Island land. The Tribe thereby relinquished all claims that Rhode Island law does not fully apply throughout the State (with limited exception in the Settlement Lands). The Tribe did so in settlement of lawsuits brought under the Trade and Intercourse Act, 25 U.S.C. §177, a law specifically designed to address when tribes may give up aboriginal title and concomitant use and occupancy rights. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (citing *Worcester v. Georgia*, 31 U.S. 515, 560 (1832)). Yet, under the First Circuit's decision, the Tribe is entitled to reacquire precisely those rights by means of the IRA and thereby limit the application of

state law on the affected lands. A review of the nature of the rights the Tribe relinquished and those that it would recoup shows that the Settlement Act foreclosed Section 465 trust.

1. Through The Settlement Act, The Tribe Relinquished Its Use And Occupancy Of Rhode Island Land, *i.e.*, Any Sovereign Authority To Regulate Rhode Island Land And Be Subject Only To Limited State Regulation.

Historically, and to the present day, the concept of aboriginal Indian title is tied to the aboriginal occupancy of land. Along with that aboriginal Indian occupancy came the concomitant right to use the land, to regulate activities on the land, and, in some instances, to be free of state regulation there. Each of these principles was reflected in federal policy that, dating back to the original Trade and Intercourse Act, protected tribal rights to such use and occupancy. The Settlement Act directly affected the Tribe's aboriginal title, use and occupancy rights, and the protections afforded it by the Trade and Intercourse Acts: the Settlement Act extinguished the Tribe's claims to title, use, and occupancy of land in Rhode Island; it therefore eliminated any claim that state regulatory authority is diminished in Rhode Island (apart from a narrow exception in the Settlement Lands); and it constituted a congressional settlement of all Indian land claims that had relied on federal laws designed to protect tribal use and occupancy rights.

The claims to aboriginal title, use, and occupancy that the Tribe relinquished in the Settlement Act

derived from principles established shortly after the nation's founding. This Court long ago recognized that the "right of [Indian] occupancy is considered as sacred as the fee-simple of the whites." *Mitchel v. United States,* 34 U.S. 711, 746 (1835). Consonant with that understanding, and with principles of natural law and the "doctrine of discovery," the Court acknowledged "the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right be extinguished by the United States." *Worcester*, 31 U.S. at 560. The Court explained that Indian nations are "distinct political communities" with authority over their territory that derived from "their own natural rights, as the undisputed possessors of the soil from time immemorial." *Id*. at 559; *see also Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945) (a tribe's claimed right to land based on "immemorial occupancy . . . has come to be known as Indian title and is likewise often spoken of as the right of occupancy").[15]

With that right to occupancy came the right to use the land. In *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823), the Court, through Chief Justice Marshall, held that although Indian tribes' "complete sovereignty, as independent nations, were diminished," tribes retained the right "to use [the land] according to their discretion." Chief Justice Marshall later elaborated that "the several Indian nations as distinct political

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[15] Unlike Georgia and most other states, Rhode Island law extended over tribes in their aboriginal land dating back to the early eighteenth century. *See*, *supra*, n. 3; *see also Worcester*, 31 U.S. at 580.

communities, hav[e] territorial boundaries within which their authority is exclusive." *Worcester*, 31 U.S. at 556-57; *see also Mitchel*, 34 U.S. at 746 (recognizing Indian tribes' "rights to its exclusive enjoyment in their way and for their own purposes").

The tribes' aboriginal rights – at least after adoption of the United States Constitution and surrender by the States to the national government of control over Indian affairs – affected the scope of state authority. This Court, for example, held in *Worcester* that "no state could interfere" with Indian tribes' "exclusive" authority on "lands they occupied." 31 U.S. at 560. Where, however, a tribe no longer possesses aboriginal title through an explicit congressional extinguishment of Indian occupancy rights, they stand in no different shoes than other persons with respect to the applicability of state law to that land. As the Court stated in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946), Indian title over land was "vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims."

Through the JMOU and Settlement Act, the Tribe abandoned its claims under the Trade and Intercourse Act to preexisting aboriginal title and use and occupancy rights with respect to land anywhere in Rhode Island. As discussed above, Section 1705(a)(2) of the Act specifically extinguished the Tribe's claims to aboriginal title, and Section 1705(a)(3) specifically extinguished any other claims the Tribe might have had to Rhode Island land, including "subsequent"

"claims for use and occupancy." The Tribe, as a sovereign, unmistakably requested that any right of use and occupancy it had be extinguished, and Congress acceded to that request in the exercise of its plenary power over Indian affairs. Congress confirmed that the Tribe would be sovereign but without Indian occupied lands other than those in the settlement area and without exemption from State law anywhere in Rhode Island. This left Rhode Island not only free and clear of all Indian land claims, but also free and clear of any impediment to the operation of its civil and criminal laws with respect to the Tribe.

2. When Land Is Taken Into Trust Under The IRA And Becomes Indian Country, A Tribe Obtains Use And Occupancy Of The Land, *i.e.*, Sovereign Authority To Regulate The Land And Be Subject Only To Limited State Regulation.

Federal trust is neither required nor necessary for the Tribe's proposed use of the disputed 31 acres as a housing development. The principal purpose and effect of placing that land into trust under 25 U.S.C. §465 is to provide an area of land for the Tribe where state regulatory law does not apply or applies in only a limited fashion. The First Circuit not only upheld the Secretary's assertion of that power, it agreed with the Secretary that the land thereby converted to Indian country. Pet. App. 5. The consequence of the First Circuit's dual holdings is that the Tribe is able to obtain the very use and occupancy rights, and concomitant limits on State regulatory authority, that

Congress had extinguished through the Settlement Act.[16]

The presence *vel non* of Indian country is the touchstone for allocating federal, tribal, and state authority with respect to Indians and Indian lands. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 343 (1998); *see also Native Village of Venetie*, 522 U.S. at 531 (where there is Indian country, "the Federal government and the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question").

Once land occupied by a tribe is deemed to be Indian country, the tribe has "the inherent power to prescribe laws for [its] members and to punish infractions of those laws." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Conversely, state regulation

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[16] Although the State disagrees with the conclusion that land taken into trust under the IRA necessarily becomes Indian country, that ruling is not before the Court. And even if trust land does *not* become Indian country, the court of appeals' ruling would substantially compromise state authority within the proposed trust lands. *See* 25 C.F.R. §1.4(a). It is true that the Secretary possesses the discretion to require compliance with state and local law under 25 C.F.R. §1.4(b) if he determines it would "be in the best interest of the Indian owner or owners in achieving the highest and best use of such property[.]" But the State did not bargain in the JMOU for the opportunity to commit the integrity of Rhode Island's laws and jurisdiction to discretionary secretarial determinations based on a highest-and-best-use criterion.

of tribal members living in Indian country is permitted only "in exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). An intricate body of law has developed with respect to tribal and state authority over nonmembers who enter, or interact with, Indian country. *See*, *e.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (establishing general rules governing tribal regulation of nonmembers); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (describing balancing test to assess validity of state regulation of on-reservation activities by nonmembers). For present purposes, what matters is this: Even as to nonmembers, tribal authority is far greater, and state authority far less, on land that is Indian country than on land that is not.

The rights Indian tribes presently exercise in Indian country overlap considerably with the aboriginal rights of occupancy in the "soil" established in the early years of the Republic. Both sets of rights are premised on tribal occupancy of land that is ultimately owned by the federal government; both encompass Indians' right to "use" the land – to exercise sovereign regulatory authority there; and in both cases, state authority on the land is significantly diminished. Although the term "use and occupancy" was initially tied to aboriginal occupancy, it has also come to apply to territory beyond a tribe's ancestral home that has nonetheless become Indian country. *See United States v. McGowan* 302 U.S. 535, 539 (1938) (Indian country exists where land is "validly set apart for the *use* of Indians. It is under the superintendence of the government. The Government retains title to the lands which it permits the Indians to *occupy*.") (emphasis added)).

The eventuality is that the rights the Tribe will obtain if Rhode Island land is taken into trust under the IRA and converted to Indian country are the very rights the Tribe sought in its lawsuit, abandoned in the JMOU, and Congress extinguished in the Settlement Act. The situation under the First Circuit's decision would be no different had the Tribe not settled its lawsuit. "[T]he Federal government and the Indians involved, rather than the states, [would] exercise primary jurisdiction over" that land. *Native Village of Venetie*, 522 U.S. at 530.[17]

In sum, the Secretary cannot provide for the Tribe what Congress has prohibited. The Settlement Act does this directly by extinguishing all tribal claims "arising subsequent to the [pre-enactment] transfer" of land. 25 U.S.C. §1705(a)(3). What Judge Fernandez of the Ninth Circuit recognized with respect to Alaska lands following ANCSA is equally true of Rhode Island land following the Settlement Act:

> If ANCSA meant anything at all it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members. As far as the land was concerned, the regular state

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[17] In *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197, 215, 221 (2005), the Court held that, although the Oneida had long ago lost sovereign control over its ancient territory, trust pursuant to 25 U.S.C. §465 provides an avenue for a tribe to "reestablish sovereign authority over territory." *Sherrill* is readily distinguishable, however, since it did not involve a congressional enactment designed to eliminate Indian land claims within a state.

> and federal political entities would have and retain the necessary power. In short, it was no longer necessary to explicate and mull over previous Indian country concepts. That was the promise of the new era.

Alaska v. Native Village of Venetie Tribal Gov't., 101 F.3d 1286, 1304 (9th Cir. 1996) (Fernandez, J., concurring).[18] A "new era" also dawned in Rhode Island upon enactment of the Settlement Act, an era that would improperly end if the Secretary were permitted to take Rhode Island land into trust on behalf of the Tribe.

C. Practical Considerations Counsel Against Permitting The Secretary To Take Rhode Island Land Into Trust Under The IRA.

Rhode Island is the smallest and one of the most densely populated states in the country. The "Ocean State" was not developed from a great expanse of the public domain as western states were, nor did it develop with federal Indian country within its borders; indeed Indian country has never existed here. A person can easily drive from north to south through Rhode Island within an hour, and from east to west in approximately the same amount of time. This means the impact of *any* land being taken into trust by the Secretary and being converted into Indian country is severe.

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[18] Although the Ninth Circuit's majority opinion was reversed in *Venetie*, this Court agreed with many of the views expressed in Judge Fernandez's concurrence.

What is at stake, though, is far more than the State's potential loss of regulatory authority over 31 acres of land. The Secretary has the power to take hundreds or thousands of additional acres of land into trust in the future, at his virtually unlimited discretion – whether it is in the center of downtown Providence near the State House or in Charlestown. This is not an idle concern. Just this year, the BIA has recommended that more than 13,000 acres in New York be placed into trust under the IRA. 73 Fed. Reg. 9,823 (Feb. 22, 2008). Moreover, with trust land can come tax-free stores and gaming, even where those activities would otherwise contravene state law. Indeed, there is nothing that constrains or requires trust land to be used in conformity with the purposes or functions described in the initial trust application.

Thirty years ago, "Congress enacted legislation effectuating [a] carefully calibrated compromise between three sovereigns" that "provided for a delicate balancing of the parties' interests." Pet. App. 75 (Selya, J., dissenting). In exchange for the Tribe's receipt of land, Congress ensured that Rhode Island's civil and criminal laws and jurisdiction would continue to apply throughout the State. The First Circuit's opinion nullified that compromise. The court of appeals' conclusion that "the Tribe, with the contrivance of the Secretary's taking the Parcel into trust, [can] walk away from an arrangement that it helped to fashion and from which it has benefited over the years," *id*. at 79, is contrary to the JMOU, the Settlement Act, and established law. It should be rejected.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

25 U.S.C. § 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian

Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 468. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

25 U.S.C. § 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified

Indians shall hereafter have the preference to appointment to vacancies in any such positions.

25 U.S.C. § 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 U.S.C. § 1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication--

> **(1)** any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past

known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an

extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

25 U.S.C. § 1707. Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed

or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

25 U.S.C. § 1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b) of this section--

> **(1)** any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the

Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the

plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.